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# CONSTITUTIONAL ASSEMBLY

# CONSTITUTIONAL COMMITTEE SUB-COMMITTEE

# JUDICIARY - THIRD DRAFT, 20 SEPTEMBER 1995

## CONTENTS

**THIRD DRAFT - 20 SEPTEMBER 1995**

***Status***: Processed as per instruction of CC Subcommittee of 8 September 1995. Amendments proposed by the Technical Experts of TC 5 in their "Addendum to Documentation" (8 Sept. 1995) and by the Justices of the Constitutional Court in their memorandum of 29 August 1995 have been incorporated. The alterations to the previous draft have been underlined and, where necessary to understand the context, omissions have been put in square brackets.

## CHAPTER

## THE COURTS AND THE ADMINISTRATION OF JUSTICE

**Judicial Authority**

**1.** (1) The judicial authority in the Republic shall vest in the courts of law established by the Constitution or an Act of Parliament.

(2) The courts shall be independent, impartial and subject only to the Constitution and the law.

(3) The courts shall apply the Constitution and the law impartially and without fear, favour or prejudice.

(4) No person and no organ of state[1] shall interfere with the courts in the performance of their functions.

(5) The decision and orders of the courts within their respective jurisdictions shall bind all persons and organs of state.

(6) Organs of state shall, through legislative and other measures, give the courts the necessary assistance to protect and ensure their independence, dignity and effectiveness.

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[1] "Organ of state" to be defined in the definition section.

(7) The jurisdiction of all courts in constitutional matters,[2] as well as the jurisdiction of the Supreme Court of Appeal in all other matters, shall be determined only by this Constitution; the jurisdiction of all other courts in all other matters shall be determined by an Act of Parliament.

(8) All other matters pertaining to the functioning of any court shall be regulated by national law.

**The judicial system**

**2.** There shall be the following courts of law in the Republic:

(a) The Constitutional Court, which shall be the highest court in constitutional matters, and which shall consist of a President, a Deputy President and nine other judges;

(b) The Supreme Court of Appeal[3], which shall be the highest court of appeal in all matters other than constitutional matters, and which shall consist of the Chief Justice, a Deputy Chief Justice and such number of judges of appeal as may be determined by or under an Act of Parliament.

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2 "Constitutional matters" - used here and in sections 3(1) and 4(1) - to be defined in a definition section as all matters relating to the interpretation, protection and enforcement of this Constitution and all Provincial Constitutions". (Previous draft used concept of "constitutional jurisdiction", which gives rise to drafting difficulties in sections 3 and 4).

3 The SCA is a redesignation of the Appellate Division, with the addition of constitutional jurisdiction. Transitional provisions must provide for any reference in any other law to the AD to be construed as a reference to the SCA.

(c) Such Courts of Appeal[4] as may be established by Act of Parliament, to hear appeals from the High Court or other ~~superior~~ courts [of similar status];

(d) The provincial and local divisions of the High Court and other ~~superior~~ courts [of similar status][5]

(e) Magistrates' Courts and other ~~lower~~ courts [of similar status];[6]

(f) Such other courts as may be established by law.[7]

**Jurisdiction of the Constitutional Court**

**3.** (1) Only the Constitutional Court shall have jurisdiction -

(a) to determine disputes in constitutional matters between national and provincial organs of state or between provincial organs of state.

(b) to consider the constitutionality of any parliamentary or provincial Bill referred to it in terms of the provisions of this

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4 **The creation of Courts of Appeal (intermediate between the High Court - currently the inappropriately named "Supreme Court" - and the Supreme Court of Appeal - currently the AD) was canvassed before TC 5 and has been under discussion since February. It is supported by the Chief Justice, the President of the Constitutional Court and Justice Ackermann, Judge President Eloff, the ALS, BLA, GCB and by the Law Commission. The establishment of Courts of Appeal is accepted in principle by the parties, but their exact ambit will have to await the Hoexter Commission Report and a consequent consultative process. The Chief Justice has, however, stressed the need for provision of this kind for their future establishment to be included in the Constitution.**

5 **Such as Water Court, Labour Appeal Court and Special Courts for Income Tax Appeals.**

6 **The NP proposal to move "other courts" to section 2(6) has been deferred to allow other parties to consider the proposal.**

7 **This section makes provision for the establishment of courts such as traditional and community courts, should this upon further investigation be determined to be desirable and feasible.**

Constitution or any provincial constitution.[8]

(2) A decision of the Constitutional Court shall bind all persons and all organs of state.

(3) The final decision as to whether a matter falls within its jurisdiction lies with the Constitutional Court.

(4) ~~There shall be~~ direct access to the Constitutional Court, with leave of that court, where the interests of justice so require.

(5) (a) If the Constitutional Court finds any law or any executive or administrative act to be inconsistent with the Constitution, it shall declare such law or act invalid to the extent of its inconsistency.

(b) The Constitutional Court may in any matter make such further order as it may deem just and equitable, including whether or to what extent any declaration of invalidity is to have retrospective operation, and an order as to costs.

(c) The Constitutional Court may suspend a declaration of invalidity for a specified period to allow the competent authority to correct the defect, and impose such conditions in that regard as it may decide.

[8] This clause is subject to the debate on the concomitant clause of the draft formulation on the National Assembly.

**Jurisdiction of other courts**[9]

**4.** (1) The Supreme Court of Appeal, a Court of Appeal, a provincial or local division of the High Court and any other ~~superior~~ court [of similar status] shall have -

(a) such inherent jurisdiction as vested in it at the commencement of this Constitution **or is deemed to vest in it in terms of this Constitution**;[10]

(b) jurisdiction in constitutional matters, subject to section 3(1); and

(c) such other jurisdiction as may be conferred by an Act of Parliament.

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9 **This subsection has been reformulated at the request of the Subcommittee in order to clarify the jurisdiction of the courts concerned, and to ensure that jurisdiction vested exclusively in the Constitutional Court by clause 3(1) is not conferred upon other courts.**

10 **Transitional provisions must ensure that inherent jurisdiction vesting in the present divisions of the Supreme Court continues in respect of the High Court, any Court of Appeal which may be established, and Supreme Court of Appeal. The phrase in bold is an attempt to meet a concern raised by the Justices of the Constitutional Court that the courts concerned, being new creatures of statute, may not have any inherent jurisdiction at all.**

(2)[11] All other courts, including Magistrates' Courts shall have

(a) jurisdiction in constitutional matters, excluding jurisdiction to enquire into or rule on the validity of an Act of Parliament or a law of a provincial legislature **or any other law determined by Act of Parliament**, and

(b) such other jurisdiction as may be conferred by an Act of Parliament.

refer back for reformulation

(3)[12] (a) A court, other than the Constitutional Court, with jurisdiction in constitutional matters may in relation to any constitutional matters concerned, make any order set out in subsection (3)(a), (b) or (c).

(b) If any such court [other than the Constitutional Court] holds a national or provincial law statute or any legislative,

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11 **Reformulated as per instructions of the Constitutional Committee that these Courts should have constitutional jurisdiction but that they should not have the power to declare laws invalid. The words in bold refer to subordinate legislation, such as regulations.**

**The Technical Experts proposed that subclause (2) should be replaced by the following:**

**"(2) Subject to sections 2 and 3, the Magistrates' Courts shall have such constitutional and other jurisdiction as may be conferred by an Act of Parliament.**

**(3) All other courts shall have such jurisdiction as may be conferred by an Act of Parliament, except that no such courts shall have jurisdiction in respect of constitutional matters".**

**They advise this approach because the according of jurisdiction in constitutional matters to the Magistrates' Courts will require extensive amendments to the Magistrates' Courts Act, 1944: especially section 110 (to make it plain that no review-type powers are given).**

12 **Clause 2(6) in previous draft.**

executive or administrative act of the State President to be inconsistent with the Constitution, such finding shall have no force or effect unless confirmed by the Constitutional Court on appeal to it or on application to it by any person or organ of state with a sufficient interest.

(c) Paragraph (b) does not preclude the granting of a temporary interdict or other temporary relief by any such court on account of such inconsistency.[13]

**Appointment of judicial officers**

**5.** (1) No person shall be qualified to be appointed or to remain a judicial officer or acting judicial officer unless he or she is a South African citizen and is a fit and proper person to be a judicial officer.

(2) A judicial officer shall, before commencing to perform the functions of his or her office, make and subscribe an oath or solemn affirmation in the terms set out in Schedule ... before a judge.

(3) The Chief Justice and the President of the Constitutional Court shall be appointed by the President in consultation with the Cabinet and after consultation with the Judicial Service Commission.[14]

(4)[15](a) Judges[16] of the Constitutional Court shall be

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13 As recommended by the Justices of the Constitutional Court.

14 The National Party has reserved its position, arguing that its agreement to these formulations was subject to how the matter of the National Executive was finalised.

15 The principle contained in this subsection has been agreed to by the Subcommittee.

appointed by the President in consultation with the Cabinet after consultation with the President of the Constitutional Court.[17]

(b) When a vacancy in the ranks of Constitutional Court judges arises, the Judicial Services Commission shall draw up a recommended list of nominees of not more than three persons in excess of the number of persons to be appointed, and shall furnish its reasons for such recommendations;

(c) The President shall make the required number of appointments from such a list with due regard to the reasons given for such recommendations.

(d) If the President decides not to accept any or some of such recommendations, he or she shall inform the Judicial Services Commission accordingly, and furnish it with reasons for his or her decision.

(e) When so informed, the Judicial Services Commission shall, [in accordance with paragraph (b)] submit further recommendations, whereafter the President shall make the appointment or appointments from the recommendations as supplemented in terms of this paragraph.

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16 This refers to members of the Constitutional Court excluding the President (see section 5(3) and Deputy President (section 5(5)). "Members" thus includes the nine judges, the President and Deputy-President.

17 See note 14.

(f) Not less than four members of the Constitutional Court shall be appointed from among the judges of the Supreme Court of Appeal, the Court of Appeal or the High Court.

(5) The Deputy Chief Justice, Deputy President of the Constitutional Court, and all other judges shall be appointed by the President on the advice[18] of the Judicial Services Commission.

(6) The appointment of other judicial officers shall be regulated by an Act of Parliament.

(7) Members of the Constitutional Court shall hold office for non-renewable terms not exceeding nine years.[19]

(8) The five oldest members of the Constitutional Court in office at the time of the expiry of the terms of office of the present members of the Constitutional Court shall retire at such expiry, and all other members after the expiry of a further period of four years.[20]

(9) Acting judges shall be appointed by the Minister of Justice on the advice of the President of the Constitutional Court, the Chief Justice, or the Judge President of the appropriate division of the High Court or other court constituted in terms of section 2(d), as the case may be. An acting member of the Constitutional Court shall not serve for a total period exceeding six months.

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18 **In order to make it quite clear that the President is bound to act on the advice of the Judicial Service Commission, it might be necessary to insert a provision to that effect in the section dealing with interpretation (as was done in e.g., the Independent Broadcasting Authority Act, 1993).**

19 **This clause has been agreed to by the subcommittee. See, however, the remarks by the Justices of the Constitutional Court in par. 13 of their memorandum.**

20 **This is a transitional mechanism and subject to further debate. It has been suggested that it could be shifted to the part dealing with transitional provisions.**

**Removal of judges from office**

**6.** (1) The President may remove a judge from office on grounds of incapacity, gross misconduct or ~~gross~~ incompetence upon a finding to that effect by the Judicial Service Commission and the adoption of a resolution at a joint sitting of the National Assembly and Senate by a majority of at least two-thirds of the total number of members of both houses.

(2) A judge who is the subject of an investigation may be suspended by the President on the advice of the Chief Justice pending the finalisation of such investigation.

(3) The emoluments and pension and other benefits of judges and acting judges shall be prescribed by national law and shall not be subject to reduction.

**Judicial Service Commission**

**7.** (1) There shall be a Judicial Service Commission, which shall, subject to subsection (3), consist of -

(a) the Chief Justice, who shall preside at meetings of the Commission;

(b) the President of the Constitutional Court;

(c) one Judge President designated by the Judges President;

(d) the Minister responsible for the administration of justice or his or her nominee;

(e) two practising advocates designated by the advocates' profession;

(f) two practising attorneys designated by the attorneys' profession;

(g) one professor of law designated by the deans of all the law faculties at South African universities;

(h) four senators designated *en bloc* by the Senate by resolution adopted by a majority of at least two-thirds of its members;

(i) four persons, [two of whom shall be practising attorneys or advocates,] who shall be designated by the President in consultation with the Cabinet;

(j) on the occasion of the consideration of matters specifically relating to a provincial division of the High Court, the Judge President of the relevant division and the Premier of the relevant province.

(2) The functions of the Judicial Service Commission shall be -

(a) to make recommendations regarding the appointment and removal from office of judges in terms of sections 5 and 6;

(b) to advise the national and provincial governments on all matters relating to the judiciary and the administration of justice;

(3) When the Commission performs its functions in terms of subsection 2(b), it shall sit without the four senators referred to in subsection 1(h).

(4) The Commission shall determine its own procedure, provided that the support of at least an ordinary majority of all its members shall be required for its decision.

(5) The Commission may appoint committees from among its number and assign any of its powers and functions to such committee.

Applment of mag. (sec 5(6)

NP proposal

– applment → indep. body.

*Constitutional Court of South Africa*
*Braamfontein, 2017*

CHAMBERS OF
JUSTICE A CHASKALSON

*29 August 1995*

FAX: 021 24 1160

H Ebrahim
Executive Director
Constitutional Assembly
P O Box 15
CAPE TOWN
8000

Dear Sirr

THEME COMMITTEE 5

I attach a memorandum which reflects the views of the members of the Constitutional Court on the most recent draft text of the chapter of the Constitution dealing with the Judiciary and the legal system.

The members of the Court are reluctant to express any views on issues which could affect them personally and have where possible avoided referring to any such issues. The question of tenure, however, has important implications which go beyond the position of particular individuals, and for that reason, is dealt with in the memorandum without suggesting any particular period as being the one which might be most suitable.

Yours sincerely

A Chaskalson

A Chaskalson
President
Constitutional Court

Tuesday, 29-8-95

**MEMORANDUM**

TO: The Constitutional Committee of the Constitutional Assembly.

FROM: Justices of the Constitutional Court.

RE: Memorandum dated 10 August 1995 by Theme Committee Five Technical Advisors.

Matters regarding the judiciary and legal systems.

1. This memorandum represents the views of all members of the Constitutional Court. On certain matters it was considered inappropriate for any comment to be made. It must therefore not be assumed that, in regard to provisions in the Memorandum on which no comment has been made, the members of the Court are necessarily in agreement with such provisions.

2. Ad section 1(1)

It is understood that the object of this sub-section is to ensure a co-ordinated, centralised National judiciary and to eliminate the possibility of a Provincial judiciary operating in tandem with a National judiciary. If that is the case it is suggested that the word "of" in the first line be replaced with the word "in". This makes the meaning more unambiguous. It also accords with the formulation in the first line of section 2.

3. Ad section 1(2)

It is suggested that the word "impartial" be inserted after the word "independent". We can see no reason why the impartiality of the Courts, in their structure and appointment, as well as in their functioning, should not be constitutionalised.

4. Ad section 1(5)

It is suggested that the word "decisions" be substituted for the word "orders". Normally the order of a Court is binding only on the parties to the case in which the order is made. Alternatively we suggest that the word "bind" be substituted by a phrase such as "be observed by" or "be respected by".

5. Ad section 2(i)

It is suggested that the words "at least" be inserted before the word "four" in the third line to make it clear that appointment of Judges from the Courts mentioned is not limited to four persons.

6. Ad section 2(ii)

The identity of the person or body who is to determine the number of Judges of the Supreme Court of Appeal is left in the air. It is suggested that the sub-section make clear by whom or by what body or institution the number of such Judges is to be determined.

7. Ad section 3(1)(b)

If section 3(1)(b) is to be retained it is strongly suggested that this jurisdiction be limited to "the constitutionality of any Bill passed by Parliament or a provincial legislature". An advisory opinion from the Constitutional Court should only be sought at the very last stage in the life of the Bill i.e. before its signature by the President. This will ensure that the Constitutional Court is not prematurely or unnecessarily involved in a dispute which may be purely political at that stage and thus, however unintentionally, be drawn into playing (actually or by perception) a political role for which it is not suited.

8. Ad section 3(6)

The sub-section is in the wrong place in as much as section 3 deals with the jurisdiction of the Constitutional Court. It should be a sub-section of section 4, preferably sub-section 3.

9. Ad section 3(6)(a)

The reference should be to the relevant paragraphs in sub-section 5, not 4. In any event the unqualified reference to "may make the orders set out in" is too wide. A phrase such as "may make orders similar to those set forth in clauses 5(a), (b) and (c) in relation to the matters over which the respective courts have constitutional jurisdiction" is suggested.

10. Ad section 3(6)(b)

It must be made plain, either in this paragraph or in another section in this Chapter, that these provisions do not preclude the granting of a temporary interdict or other temporary relief by the "other Court" premised on the finding of inconsistency..

11. Ad section 4(1)

We understand one of the objects of this sub-section to be the preservation of such inherent jurisdiction as the various divisions of the present Supreme Court currently possess and to transfer such inherent jurisdiction, as it were, to the Supreme Court of Appeal, the Court of Appeal and the High Court and other Courts of similar status. The current formulation assumes that the Supreme Court of Appeal, the Court of Appeal and the High Court and other Courts of similar status will have inherent jurisdiction existing at the date the new Constitution takes effect. This may well be a faulty assumption in as much as all these Courts, being new Courts and all creatures of a statute, may not have any inherent jurisdiction at all. It is suggested that the sub-section be reformulated

to express more clearly the intended object and to eliminate any uncertainty in this regard.

12. Ad section 5(4)

Subject to the qualification that the composition of the Judicial Service Commission is not altered we would support the retention of section 99(4) and (5) of the Transitional Constitution.

13. Ad Section 5(7) and 5(8)

1. Inasmuch as the question of tenure affects, or could affect, all members of the present Constitutional Court, it is invidious for current members of the Court to make specific proposals regarding tenure which, bearing in mind the need for transition, might affect their own tenure.

2. It is appropriate however to analyse various possibilities in the abstract and to point at features which would or might adversely affect the independence of the Constitutional Court or the proper discharge of its functions under the Constitution.

3. There are three main approaches to the question of length of tenure

(a) appointment for a tenure similar to that currently served by Supreme Court Judges;

(b) appointment for a specified term;

(c) appointment for a specified term coupled with a maximum age-limit.

4. In terms of the Memorandum under consideration, the Appellate Division (Supreme Court of Appeal) is (at an appellate level) to be given the same constitutional jurisdiction as the High

Court (current Provincial and Local Divisions of the Supreme Court). A fully integrated and vertical system is envisaged (with the exception of matters within the exclusive jurisdiction of the Constitutional Court) and on constitutional matters the Constitutional Court will in appropriate cases hear appeals from the Supreme Court of Appeal. That being the case, there is an argument, from consistency and integration, for giving the judges of the Constitutional Court tenure on exactly the same basis as the other superior courts (it is assumed that the current system of tenure for the Supreme Court Judges will be retained).

5. Appointment for a specific term only is not evaluated any further because this would not ensure staggered retirement in the absence of quite arbitrary shorter terms for specific judges.

6. Appointment for a specified term, coupled with a maximum age-limit could, subject to important conditions, not detract from the quality and competence of the Court and at the same time ensure the continuity of the Court through retirement at different times.

1. It is unnecessary to emphasise the importance of both the actual (and perceived) independence of the Constitutional Court, not only for the success of the Constitutional Court as an institution, but indeed for the Constitution itself. In the light hereof, it must be appreciated that the shorter the period of tenure, the greater the danger to the actual (and perceived) independence of the Constitutional Court.

2. With a short period of tenure, many Judges of the Constitutional Court will not have reached conventional retiring age when such a short term of office has expired. It is possible that they may, on leaving the Court, be offered appointments of some other nature from National or Provincial Governments, or from business concerns. A short term on the Constitutional Court could then be seen as a mere stepping stone to some other appointment, with negative consequences for the perceived independence of the Constitutional Court as an institution. Such subsequent appointment could be seen as a "reward" for satisfactory work done on the Constitutional Court.

6.3 A short period of tenure could also result in Judges of the Constitutional Court who were appointed to the Constitutional Court from one of the Superior Courts being obliged (by virtue of the provisions of the Judges' Remuneration and Conditions of Employment Act 88 of 1989 (as amended) ) to return to the Superior Courts from which they were appointed, upon expiry of their term of office with the Constitutional Court. It seems undesirable for Constitutional Court Judges to return to Courts bound by judgments of the Constitutional Court.

6.4 A short period of appointment could have another significantly adverse effect on the status and competence of the Constitutional Court. An able young practising lawyer might be very reluctant to accept appointment for a short time, bearing in mind that the general rule in South Africa is that former judges do not return to active practice after leaving the Superior Courts. Even if they were permitted to do so, it would be quite invidious for the young lawyer in question, after having

served his/her term, to appear before the Constitutional Court. Similar invidious difficulties could arise in the case of younger academics. A short term of office might dissuade the ablest academic from accepting appointment because of the uncertainties attendant on resuming the same, or an equally advantageous, academic career. It would seem that a situation ought to be avoided where academic nominees decline to accept appointment for such reasons.

7. A tenure (sufficiently long) coupled with mandatory retirement at a particular age, even where tenure has not been completed, would ensure a satisfactory rotation of staggered retirement both for the existing and future Constitutional Courts, provided the unsatisfactory consequences alluded to in 8.3 above are avoided.

# MEMO

**TO:** CHAIRPERSONS AND EXECUTIVE DIRECTOR OF THE CA

**FROM:** PANEL OF CONSTITUTIONAL EXPERTS

**RE:** ATTORNEY-GENERAL/PROSECUTORIAL AUTHORITY

**DATE:** 20 SEPTEMBER 1995

**SUMMARY**

1. On the premise that the prosecutorial authority shall be constitutionalized and that agreement has been reached on the requirement that such authority shall be independent and impartial, the Panel took account of and analyzed *inter alia* the history of the office of the Attorney General (AG) in South Africa, the situation in some other legal systems, submissions made to the CA (also with regard to practical considerations about crime control and effectiveness) and the relevant Constitutional Principles (CPs).

2. The aim was to determine the nature of the prosecutorial authority in order to reach conclusions on issues such as the meaning and scope of its independence, as well as how to ensure such independence, the burden of political responsibility and accountability and the question whether this authority should be exercised by a national functionary, or by independent provincial prosecutorial heads.

3. Comparative research indicates that a variety of models are followed in the world, that prosecutorial authorities are seldom totally independent of all branches of government and that different degrees and methods of political responsibility, accountability and independence exist. In no legal system known to the Panel is the prosecutorial power exercised only on a provincial level by functionaries who are totally independent from any national control or direction.

4. In a recent Namibian judgment it was found on an interpretation of the Namibian Constitution, *inter alia*, that direct ministerial control and intervention (as was the case in South Africa before 1992) is not in accordance with the imperatives of the constitutional state, but that the minister (or AG as a Cabinet member) must be informed and bears "final responsibility" for the office of the prosecutorial authority.

5. Historical and comparative evidence and an analysis of the duties of a prosecutorial authority suggest that the nature of this office is neither of a purely executive nor a purely judicial nature, but rather quasi-judicial or *sui generis*.

6. Against this background, and in view of the relevant CPs, it is recommended that:

6.1 the prosecutorial authority should be structured nationally, with provincial or regional offices responsible to a national AG, rather than having an

independent AG for each province;

6.2 the prosecutorial authority should be independent, impartial and immune from political manipulation, but also fully accountable;

6.3 the political responsibility of the government for crime control on related matters should be taken into account in formulating models regarding the prosecutorial authority;

6.4 effective mechanisms regarding appointment, tenure and reporting should be designed to ensure the aforementioned;

6.5 new titles or terminology deserve consideration.

7. Three draft texts are put forward for the purposes of discussion.

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## 1. INTRODUCTION

1.1 During a debate in the Sub-Committee of the Constitutional Committee on Friday 8 September 1995, the Chairperson of the CA requested the Panel to formulate an opinion on the "Attorney-General" (AG).

The Panel based the interpretation of its mandate on the draft text (with footnotes) of 25 August 1995, included on pages 14-15 of the relevant documentation, as well as the debate around this draft text in the Sub-Committee.

1.2 The Panel's recommendations and other remarks are thus based on the assumption that a draft constitutional text on the AG is to be discussed by the CC. **The Panel was not requested to express an opinion as to whether or not the office of the AG or prosecutorial authority ought to be constitutionalized.**

1.3 It was accepted that agreement had been reached on the **independence** (and presumably **impartiality**) of the AG. (See 1(2) of the draft text, with footnote 4, on page 14 of the Sub-Committee documentation.)

1.4 The Panel was specifically requested to do comparative research regarding the position of the prosecutorial authority in other countries. It was regarded as useful to include a brief summary of the history of this office in South Africa.

1.5 Against this background, the Panel reflected on the nature and functions of the office, its relationship with the executive and with Parliament (and thus the possible meanings of "independence" and "accountability") and desirable degrees of "centralisation" and "devolution", including the question as to whether or not the prosecutorial authority in South Africa should be exercised by a National Attorney General (NAG), or separately and independently in each of the provinces. These questions were examined in the light of the submissions received from political parties, AGs, judges, lawyers' organisations and other role players. The relevant Constitutional Principles and practical considerations which govern effective enforcement of the law, crime control and prevention and prosecution of criminals were taken into account, as well the sensitivities which surround this issue because of the existing situation in South Africa.

1.6 One aspect which could cause some confusion is the different meanings attached to terms such as "attorney-general", "solicitor-general", "director of public prosecutions" and "prosecutor-general" in various jurisdictions. Some of these will be clarified below, e.g. in the comparative section. In South Africa some lack of understanding on the side of the public also occurs, because of the use of the term "attorneys-general" for people, who are not actually attorneys, but state advocates and other prosecutors in

criminal proceedings. The designation "state attorney", for those acting as attorneys for the state in civil cases increases the confusion. The present terminology is the result of historical developments. New terminology deserves consideration.

## 2. HISTORY AND DUTIES OF THE AG IN SOUTH AFRICA

2.1 The office of the public prosecutor in South Africa dates back to the Dutch colonial era. Soon after 1652 a 'Fiscal' was appointed, to investigate crimes and to prosecute offenders. His authority was later widened to include the duty to report even the Governor to the authorities in the Netherlands. Later the office was made subordinate to the local Government. During the Batavian period (1803-1806) the title 'Fiscal' was changed to 'Attorney-General'. The AG was appointed by the Dutch Government and his authority to prosecute was subject to approval of the court.

2.2 When the British occupied the Cape in 1806, they reintroduced the title of Fiscal. The Fiscal was also vice-president and acting president of the Court of Justice, as well as chief of the police. The Fiscal was theoretically independent, but in political cases the colonial government communicated with him. The office of AG was instituted only in 1828, to act *inter alia* as public prosecutor. The AG was also a political office. In 1874 it was recommended by a Commission that the AG should cease being a member of the government and rather be a permanent member of the crown, independent from the ministry.

2.3 AGs in the old republics of the Transvaal and Orange Free State and in Natal were responsible for public prosecutions, held several other senior executive posts (including chief of police and prisons) and were even allowed to practice privately.

2.4 When the Union of South Africa was formed, the power to prosecute was entrusted to four AGs, one for each province. All other functions of the previous AGs were taken over by the Minister of Justice. No provision for ministerial control over the AG or for accountability to Parliament existed.

2.5 In 1926 - apparently after an AG declined to prosecute a man called Jollie who tried to derail a train carrying Justice Minister Jan Smuts - the final control over prosecutions was removed from the AGs and vested in the Minister of Justice. This was done both because public servants were not responsible to Parliament, and for reasons of policy.

2.6 Because of the intolerable burden of accountability which this arrangement placed on the Minister, the AGs were in 1935 again vested with the power of prosecution, subject to the direction and ultimate control of the Minister of Justice, who was a member of the Cabinet.

2.7 In terms of the General Law Amendment Act of 1957 and **Section 3(5) of the Criminal Procedure Act 51 of 1977**, the AG exercised his authority subject to the control and direction of the Minister of Justice "who may reverse any decision arrived at by an attorney-general and may himself in general or in any specific matter exercise any part of such authority and perform any of such functions". (Former Ministers of Justice often stated that interference would seldom take place, and only when national interests were involved. Allegations and suspicions of political interference, or of AGs vigorously and keenly pursuing the policies of the government, often came to the fore.)

2.8 The **Attorney-General Act 92 of 1992** changed the position. The President appoints an AG for the area of jurisdiction of each provincial division (and the WLD) of the Supreme Court. The Minister of Justice appoints deputy AGs. However AGs are no longer subject to the control and directions of the Minister. The Minister coordinates the functions of AGs and can at most request an AG to furnish information or a report and to provide reasons regarding matters handled by the AG. An AG must submit a report to the Minister annually, and such report must be tabled in Parliament where the Minister can be questioned on it. The President can remove an AG from office only when requested to do so by both of the houses of Parliament. Thus AGs are independent from the government to the extent of being free to argue before the Constitutional Court that legislation is constitutional, although the government may believe that it is not. (In such cases the government may appoint lawyers to argue against an AG, as happened in the recent capital punishment case.)

2.9 **Section 108 of the interim Constitution of 1993** vests the authority to institute criminal prosecutions on behalf of the state in the "attorneys-general" of the Republic. The area of jurisdiction, qualifications, powers and functions of AGs are left to be prescribed by law. Section 241(4) reflects the position of AGs holding office immediately before the commencement of the Constitution.

2.10 Several other laws also contain references to the office of the AG. The most important duties of the AG are to: decide whether or not to institute criminal proceedings (including the weighing of evidence, consultation with witnesses, instructions to the police and prosecutors and advice and guidance to prosecutors); conduct prosecutions in the Supreme Court; consider representations from the public; provide opinions in review cases at the request of judges; comment on proposed legislation.

2.11 The office of the AG has been a powerful one. The courts not only showed considerable respect for decisions of AGs and were not inclined to interfere in, control, or even comment on the exercise of their discretion, but even

accorded high praise to this office[1]. An AG has the right to prevent the granting of bail in certain circumstances, without the court being able to question this decision.[2] An AG furthermore has the power to order the detention of a witness under certain circumstances.[3]

## 3. COMPARATIVE PERSPECTIVE

3.1 A variety of models and possibilities exist in the world. Many of these are obviously linked to the history and constitutional arrangements in different countries, as well as to specific characteristics of different systems of law and legal administration. With regard to the Commonwealth, for example, it has been stated that "(a) review of the existing systems operating at present ... produces a somewhat bewildering series of alternate arrangements, the nature of which cannot be fully understood without reference to the prevailing political context of each individual country."[4]

3.2 It is clear that an ideal prosecutor's role that could serve as a model for all criminal justice systems does not exist. Existing differences relate to the method of appointment (or election), the political nature of the office and the relationship between the office and the government of the day, the way in which the discretion to prosecute is exercised, and the degree to which the prosecutor's office is centralized and hierarchically organized. With regard to the last issue, it can be noted that where a criminal justice system is dominated by a policy of uniform law enforcement, great emphasis will usually be placed on comprehensive and rigid central supervision. If, however, a criminal justice administration is governed by the idea that prosecution should conform with what is considered desirable on a local level, the individual prosecutor needs some degree of independence.[5]

3.3 No example could be found of any federal or other system where a national competency such as justice is exercised **only** on a sub-national level, or where provincial prosecutorial authorities operate in the absence of or independently from a national or federal authority, as far as the enforcement

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1 James JP in S v Hassin 1972(1) SA 200(N)

2 S 21 of the Criminal Law Second Amendment Act 126 of 1992; S 61 of the Criminal Procedure Act 57 of 1977

3 S 185 of the Criminal Procedure Act 51 of 1977

4 Edwards, in a paper on 'Emerging Problems in Defining the Modern Role of the Office of the Attorney-General in Commonwealth Countries', quoted in the recent Namibian case (see below).

5 Herrmann 535 - 538

of national or federal law is concerned.

3.4 Some examples which bear out the above conclusions can be briefly mentioned.

3.5 In **Commonwealth countries** several 'models' seem to be followed. The summary of these (with reference to authors on the topic[6]) taken with some amendments from the recent Namibian judgment referred to below, is useful to some degree:

3.5.1 **Model 1**

Prosecutions are directed by a public servant who is not subject to the direction or control of any other person or authority. This person may be referred to as an AG or Director of Public Prosecutions (DPP). In some jurisdictions the prosecuting authority (or AG) will have other functions as well (such as advising on legislation). Systems exemplifying this model include those in Kenya, Sierra Leone, Singapore, Pakistan, Sri Lanka, Malta, Cyprus, Western Samoa, Bahamas, Trinidad and Tobago, Botswana and the Seychelles.

In other jurisdictions the DPP is responsible only for prosecutions. This model to some extent exemplifies the classic Commonwealth pattern which the United Kingdom Government consistently sought to incorporate in the independence constitutions of many colonies. Following independence in many countries, this particular provision was changed to bring the DPP under the direct control of the AG or Minister, to secure Ministerial responsibility. Jamaica and Guyana, however, have retained the total independence of the office of DPP.

3.5.2 **Model 2**

The AG is a political appointment. He or she is a member of the Government but, although holding Ministerial office, does not sit regularly as a member of the Cabinet. The AG of England and Wales typifies this particular model.

3.5.3 **Model 3**

The AG is a member of the Government and, as such, is normally included in the ranks of Cabinet Ministers. In some jurisdictions, though this is by no means a universal practice, the office of the AG is combined with the portfolio of Minister of Justice (or similar title). Most of the Canadian provinces and the Canadian Federal Government have adopted this model. Other countries that fall within

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6 E.g. Edwards; also see Rose and Paul 57-58.

this category include Australia (both the states and the Commonwealth Government), Nigeria and Ghana. Where, in these jurisdictions there exists a DPP (or its equivalent), the DPP is, in the ultimate analysis, subject to the direction and control of the AG.

3.5.4 **Model 4**

The DPP is a public servant. In the exercise of his or her powers he or she is subject to the directions of the President but to no other person. This is the situation in Tanzania and which prevailed in Ghana during the latter stage of the first Republic from 1962 to 1966.

3.5.5 **Model 5**

The DPP is a public servant. Generally the DPP is not subject to control by any other person but if, in his or her judgment, a case involves general considerations of public policy, the DPP must bring the case to the attention of the AG, who is empowered to give directions to the DPP. This model is applicable in Zambia alone at present. In Malawi, the DPP is subject to the directions of the AG. If, however, the AG is a public servant, the Minister responsible for the administration of justice may require any case, or class of cases, to be submitted to him or her for directions as to the institution or discontinuance of criminal proceedings.

3.5.6 **In summary** it could be said that the general power to prosecute in Commonwealth countries may vest either in an independent public servant or is a member of government. In the later case the term AG is normally used.

Issues regarding the separation of powers, independence and accountability are addressed differently and no conclusive solution is offered. However, even in federal systems within the Commonwealth justice as a national competency is only exercised on a provincial level only. In Canada, for example, where the administration of justice is a federal matter, the Minister of Justice who is a member of the Cabinet and of Parliament is the ex officio AG of Canada. The Deputy Minister of Justice is the senior official in charge of the Department of Justice and also the ex officio Deputy AG. Provinces have AGs and deputy AGs. In Australia where justice is a state competency the federal AG is a member of the Cabinet under whose directions the federal DPP falls. After some reform to safeguard the prosecutorial office against political manipulation, the Australian DPP still performs his or her functions subject to directions or guidelines from the Minister or AG. Such guidelines are furnished in writing and published in the Government Gazette, after consultation with the DPP.

Ministerial responsibility regarding the prosecutorial function has been

part of the Westminster tradition. The responsible Minister, often called the AG, is a member of the Cabinet and the legislature and is responsible to the executive and to Parliament and thus reflects the interests of the public. The actual prosecutorial power is then exercised by a DPP, who functions under the control and direction of the AG. Because of the danger that the prosecutorial power may be abused for party political purposes, the Commonwealth office sought to make the prosecutorial authority entirely independent of the executive and legislature when drafting constitutions for newly independent Commonwealth countries in Africa and the Carribean. As indicated above, ministerial responsibility has been reintroduced in some of these systems.

3.6 In **Germany** the federal prosecutorial authority is headed by the Federal Prosecutor ('Generalbundesstaatsanwalt') who is appointed by the federal Minister of Justice. This office is an 'independent organ of the administration of justice' but is accountable to the Minister of Justice.

Each of the 'Länder' or provinces of the Federal Republic also has 'Generalstaatsanwälte', who is accountable to the Minister of Justice of the "Land". In many 'Länder' these are political officials, a fact which has been subjected to some criticism.

The federal Minister of Justice lays down policy guidelines. The 'Bundesstaatsanwalt' does not lay down policy for the 'Länder', but may intervene to take specific cases over from a 'Land' in cases of national and federal interest, such as drug trafficking, hijacking, or terrorism.

In particular cases of national importance (e.g. involving foreign nationals or relations) the federal prosecutor may seek advice from the Minister, and the Minister can even instruct the prosecutorial authority not to prosecute in particular instances. Apparently this rarely if ever happens in practice and the possibility of such ministerial intervention has been criticised by some German commentators.

The situation in Continental Europe is generally not very different from the above. In Eastern Europe there has been a recent trend towards a greater degree of independence than before, away from party political control.[7]

3.7 In **the United States of America** the federal and state prosecuting systems are entirely separate.

3.7.1 The federal AG in the US is the head of the Department of Justice, akin to our Minister of Justice. As head of this department, he or she

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[7] Herrmann 533 and in general.

has authority over all functions of the Department, including 93 US attorneys' offices around the country which are responsible for federal prosecutions.

The office of the AG is not specified in the US Constitution. Legislation stipulates that the US AG shall be appointed by the President subject to Senate confirmation.

The US Attorneys for each of the 93 federal districts are also appointed by the President, subject to Senate confirmation. These US Attorneys run large offices that deal with the federal government's civil and criminal litigation in their district. Traditionally they have a great deal of autonomy but they are subordinate to the AG and to the head of the Washington office's criminal division. The AG does not supervise day-to-day running of these offices.

In theory at least, the institution of the Grand Jury provides a check on the political nature of the federal prosecuting authority. All prosecutions for felonies must be initiated by a Grand Jury indictment. In practice the Grand Jury general confirms the prosecutor's charging decisions.

The 'Solicitor General' (SG) is also appointed by the President, subject to Senate confirmation. He or she is in charge of representing the government before the Supreme Court. The SG functions as an advocate and not, like the AG, as an executive policy-maker.

3.7.2 Each of the separate states in the US is free to organize its justice functions as it wishes. In most, but not all, states, the AG is an elected official with almost no authority over criminal prosecutions. Instead, a state AG functions as the state's civil attorney (akin to South Africa's 'state attorney').

Prosecution in state matters (i.e. not federal offences) is usually a county level function. Each county typically elects its own 'district attorney' (DA) who, once elected, has complete autonomy with respect to the organization of the office and its operations. (DAs hire staff, organize their offices into whatever departments they choose, promulgate prosecuting guidelines, exercise supervision etc.) In most states the only limit on a DA's autonomy is the Governor's power to remove him or her in cases of gross corruption.

Elections are usually five yearly. If a DA is defeated, the successor is free to reorganize the office entirely. However, now many staff positions within DA offices have civil service protection and therefore staff cannot be fired for political reasons.

3.8 In **Namibia** a recent judgment of the Supreme Court[8] addressed, *inter alia*, the relationship between the government and the prosecution. The offices of the AG and 'Prosecutor General' (PG) are constitutionally recognized. The office of the AG, who is (but need not be) a cabinet member, is recognized by the Court to be a political one, because the appointment of the AG by the President is political, just like the appointment of the Prime Minister and Ministers. In contrast, the appointment of the PG by the President on the recommendation of the Judicial Services Commission in accordance with Article 32(4)(a)(cc) of the Constitution suggests that the functions of the PG are quasi-judicial in nature. The court approached the issue of the relationship between the AG and the PG from the angle of constitutionalism and the constitutional state, and by looking at comparative material.

The Court held that the former Section 3(5) of the South African Criminal Procedure Act of 1977 (discussed earlier in paragraph 2.6) is not the product of a "Rechtsstaat" and is not compatible with the "Grundnorm" relating to the separation of powers. It paves the way for executive domination and state despotism and represents a denial of the cardinal values of the Constitution, the Court found.

The Court also held that although article 87 of the Constitution gives the AG the final responsibility for the office of the PG, the AG does **not** have the authority to instruct the PG to institute a prosecution, to decline to prosecute, or to terminate a pending prosecution in any matter. The AG also does **not** have the authority to instruct the PG to take or not to take any steps which the AG may deem desirable in connection with the preparation, institution or conduct of prosecutions. However, the AG **does have** the authority to require that the PG keeps him or her informed in respect of all prosecutions initiated or to be initiated which might arouse public interest or involve aspects of legal or prosecutorial authority.

The Court concluded as follows:

"Thus interpreted, the office, (of the Prosecutor General) appointed by an independent body, should be regarded as truly independent subject only to the duty of the Prosecutor-General to keep the Attorney-General properly informed so that the latter may be able to exercise ultimate responsibility for the office. In this regard it is my view that final responsibility means not only financial responsibility for the office of the Prosecutor-General but it will also be his duty to account to the President, the Executive and the Legislature therefor. I accept that on this view of the respective Articles the "final responsibility" may be more diluted and less direct but it is nevertheless still possible for such responsibility to be exercised provided that the Attorney-

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[8] Ex Parte AG: in re the Constitutional Relationship between the AG and the Prosecutor-General Case No SA 7/93, 13.7.1995, per Mahomed CJ, Dumbutshena AJA and Leon AJA

General is kept properly informed. On this view of the matter the Constitution creates on the one hand an independent Prosecutor-General while at the same time it enables the Attorney-General to exercise final responsibility for the office of the Prosecutor-General. The notions are not incompatible. Indeed it is my strong view that this conclusion is the only one which reflects the spirit of the Constitution, its cardinal values, the ethos of the people, and articulates their values, their ideals and their aspirations. It also is entirely in accordance with the "uniquely caring and humanitarian quality of the Constitution....

I would add only this. I would strongly recommend that, these issues having been settled, the Attorney-General and the Prosecutor-General adopt the English practice of ongoing consultations and discussions which would be in the best interests of the cause of justice and the well-being of all the citizens of Namibia."

Thus in Namibia the PG, who is the prosecuting authority, is recognized as **independent.** With regard to **accountability**, the "final responsibility" lies with the AG as a member of government. The meaning and content of "final responsibility" is not made very clear. The court's recommendation that the AG and PG should consult and discuss on an ongoing basis is presumably intended to fill this gap, although the court does not state what their consultation and discussions should cover.

3.9 Finally, attention may be drawn to **two different basic principles which provide the basis for prosecutorial policies** and are applicable in different legal systems, namely the **legality principle** and the **opportunity principle**. The primary premise of the first is **mandatory** prosecution, or that prosecution **must** take place in all cases in which sufficient evidence exists of the guilt of a suspect and in which no legal hindrances prohibit prosecution. The prosecution can thus exercise only limited discretion. The opportunity or expediency principle, on the other hand, does not demand compulsory prosecution and allows for discretion even when proof exists, e.g. not to prosecute children, old, or ill people. In South Africa the opportunity principle applies (as in Belgium, Denmark, France, Great Britain and the Netherlands). The legality principle applies in Australia, Germany, Italy, Portugal and Spain, amongst others. Both systems have advantages and disadvantages. The opportunity principle allows for unlimited discretion which contains the potential for corruption, discrimination, arbitrariness and political manipulation. The legality principle protects the prosecution against these, to some extent, but is rigid and sometimes even unworkable. Discretion also creeps in under the guise of unlikelihood of conviction. Prosecuting guidelines may to some extent capture the advantages of both these principles.

## 4. SUBMISSIONS RECEIVED

4.1 As far as the issue of a National Attorney-General (NAG) is concerned, the submissions described in paragraph 1.5 fall into two broad categories. The first advances the notion that there ought to be nine independent AGs in the country, one for each province, and that there is no need for NAG or coordinating officer. The second broad view is that national coordination and policy guideline determination are essential to a proper administration of criminal justice in South Africa, that a national office should be established and that provincial offices should be under its authority.

4.2 There is considerable agreement amongst the submissions that the AG (or AGs) ought to be independent and thus not susceptible to political control or manipulation, that no AG ought to be obliged to obey a political directive in relation to a specific case, and that no Minister ought to be able to give instructions to an AG on the withdrawal of a case.

4.3 On the other hand the need for political responsibility and accountability is also stressed. To be able to prevent and control crime, the government of the day must have a say in the formulation of prosecutorial policy. The prosecutorial authority furthermore needs to be accountable in a real way as far as its sensitivity towards constitutional values, the policy of the government and the needs of the community are concerned. A balance thus has to be found between independence and accountability.

4.4 Although those who have made submissions agree that the AG ought to be accountable, there are differences in regard to precisely how the balance between independence and accountability should be attained. Those parties who advance the view that there ought not to be a national AG appear to link this position to the fear that a national AG would in some way render that office more susceptible to political manipulation and compromise the independence of the office of the AG. There are also differences in regard to the person or body to whom such an AG should be accountable.

4.5 In addition to their reliance on the concern for the independence of the office which is described above, the AGs (and in particular the Association of State Advocates of SA) rely in their submissions, on what they contend to be the practical ineffectiveness of a national AG. Indeed, they suggest that there may be no work for such an AG at all, or at the other extreme that such a national office may either be overburdened with too many complaints and other such matters to handle.

4.6 None of the parties who made submissions to the CA directly indicated the relevance of the Constitutional Principles (CPs) contained in Schedule 4 of Interim Constitution in a determination of this issue. While it cannot be doubted that many of those who made submissions had the CPs within their focus when submissions were made, the submissions did not refer to the CPs.

4.7 Overall there seems to be considerable agreement amongst those who made

submissions that a prosecutorial system for South Africa ought to be:-

4.7.1 independent from political control, manipulation or intimidation

4.7.2 impartial

4.7.3 effective

4.7.4 sufficiently uniform to ensure equality before the law

4.7.5 sufficiently flexible to ensure that local and regional needs can be taken into account

4.7.6 accountable, in a way which is not superficial.

## 5. A SUGGESTED APPROACH; A DEFINITION OF PROSECUTORIAL POWER IN RELATION TO FUNCTIONAL AREAS; THE RELEVANT QUESTIONS

5.1 Questions such as whether there should be a NAG and how this NAG, or several AGs, should be appointed and be accountable but independent, have to be examined in relation to the broader theoretical background defining the nature of prosecutorial power and placing this in its appropriate context. The debate is not assisted by reference to AGs as persons appointed to do certain work. The question is not whether there ought to be nine independent AGs or whether these nine persons should be controlled by and made accountable to one NAG. The question is rather whether the country requires a single prosecutorial authority sufficiently flexible to cater for provincial and local variation, or whether there is need for nine independent prosecutorial authorities in this country.

5.2 The precise extent and limits of prosecutorial power have undergone considerable change over the past centuries in relation to independence, accountability, responsiveness, and so on. It is not necessary to go into the details of these changes. Suffice it to say that the power to prosecute (which is a state power) has often been seen as a necessary extension of good government and therefore as the exercise of an executive power and function. On the other hand, theorists have tended to emphasize the discretionary and decision-making aspects of the AG and have tended to classify them more as judicial functions. The latter view has sought to draw sustenance from the important duty of the prosecutor and to place all material before a court, whether such material is favourable to the state case or to the accused. These view are relevant to the determination of the earlier mentioned balance between independence on the one hand and political responsibility and accountability on the other, as well as to the application of the Constitutional Principles.

5.3 It is now accepted, that the function of a prosecutorial authority has both executive and judicial elements and that this function is more properly described as quasi-judicial[9] or even *sui generis*.

5.4 Although there are difficulties in classifying the prosecuting power and function as purely executive or judicial, it is clear that it is aimed at crime prevention, crime control, the achievement of stability and the attainment of justice in SA. It can therefore not be doubted that it falls within the sphere of the administration of justice and therefore within the functional area of justice.

5.5 In this regard, it may be significant to mention that only one of the parties required justice or the administration of justice to be within the competence of a province. Indeed, the submission from the Association of State Advocates of SA specifically disavows any contentions that justice ought to be a provincial competence.

5.6 The rest of this memorandum will address **two distinct but closely related questions, namely (1) whether the prosecutorial authority in South Africa should vest in independent and separate provincially based offices, or in a national office (possible with its functionaries organized on a provincial basis) and (2) what methods could be used to best ensure the independence of the prosecutorial authority, as well as its accountability within the context of political responsibility.**

**These questions are approached by taking into account the relevant Constitutional Principles, the recent Namibian judgment and practical considerations put forward in the earlier mentioned submissions.**

## 6. THE RELEVANT CONSTITUTIONAL PRINCIPLES

6.1 No Constitutional Principle (CP) directly refers to the AG or prosecutorial authority, but several CPs are relevant. It is necessary to determine the cumulative effect of the relevant principles. The existence of or need for separate and independent prosecutorial authorities on a provincial level is not indicated by the CPs. **It would seem that a single prosecutorial authority is preferable, provided that questions regarding practicality, local and regional needs, independence, accountability and the abuse of power can be adequately resolved.**

6.2 CPI provides for equality in a sovereign state. The concept of equality underlies the entire Constitution and may be regarded as fundamentally important moral imperative of the Constitution. Apart from being referred to

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9 See the definition by Leon AJA in the Namibian Attorney-General case (p. 11)

in the Preamble, the importance of equality is implied by CPII and CPIII.

6.3 In particular CPV commands an equitable legal system in which there is equality before the law. This principle militates against the notion of prosecutorial systems in different provinces operating unevenly, subject to different policy guidelines, or differentiated by the application of discretion in accordance with widely varying considerations. We understand that the proposal of those parties which do not favour a NAG is that policy guidelines may well be laid down by the Minister or some national functionary charged with this responsibility. Full weight must of course be given to this, but it must be borne in mind that policy guidelines would, by their very nature, be broad and susceptible to varying interpretation by several separate and totally independent AGs.

6.4 CPVI requires a separation of powers amongst the judiciary, the legislature and the executive, while CPXVI requires government to be structured at national, provincial and local level. We have already pointed out that the powers and functions exercised by a prosecutorial authority cannot be compartmentalized into one or other of the above categories. However, these two principles facilitate a consideration of this question by reference to the criteria in terms of which powers are to be allocated to the national and to the provincial respectively as contained in Principle XX and XXI.

6.5 CPXX juxtaposes the criteria of financial viability against administrative efficiency, and national unity against legitimate provincial autonomy and cultural diversity. We do not understand that those who favour nine independent AGs contend that this is necessary on account of legitimate provincial autonomy. The argument seems to touch on the cultural diversity element contained in the principle to the extent that emphasis is placed on different practical realities in certain of the provinces. The principle requires national unity to be balanced against cultural diversity and can be most adequately catered for in a judicial system which accommodates both.

6.6 CPXXI 1 appears to encapsulate the subsidiarity principle and requires a consideration of effectiveness. It has been contended that the appointment of a NAG would render the system ineffective in as much as all decisions in regard to whether or not a prosecution should be instituted, if required to be taken nationally, would cause a degree of malfunction (referred to as 'chaos' in certain submissions). Careful consideration however reveals that there is already a great deal of delegation in the provincial functioning of the prosecutorial system. AGs are assisted by a number of deputies who, in turn, rely on a number of senior prosecutors stationed at various courts throughout the particular province. Each of these persons take appropriate decisions at the appropriate level in terms of appropriate authority. The principle of appropriate delegation - if reasonably applied - would not render the system ineffective merely by reason of the appointment of a national prosecutorial officer. (The federal prosecution system in USA, described in 3.7 above, provides a telling example.)

The prevention, control and prosecution of crime is a matter which has significant national implications. National standards of prosecution are necessary as is the need to determine minimum standards by which prosecutors would operate throughout the country. Serious economic crimes could well have implications for economic unity. The interrelationship between crime and national security is obvious. There is also the question of inter- provincial crime as well as the issue of a crime committed near a border between provinces A and B which the AG of province A is not prepared to prosecute because of the particular need of that province. This decision not to prosecute could well be to the prejudice of province B.

6.7 CPXXI 6 requires a power to be allocated to a province where the power concerns the specific socio-economic cultural needs of the community or the general well-being of the inhabitants of the province. The exercise of prosecutorial power does not usually concern itself with the specific socio-economic or cultural needs of the community, although it sometimes might. It is true that effective prosecutions do contribute to the general well-being of the inhabitants but it is difficult to see how this aspect of crime control would contribute to the well-being of the inhabitants of a province as distinct from the well-being of the inhabitants of the country as a whole.

6.8 Prosecutors would clearly be part of the Public Service which means that CPXXX which calls for an impartial, efficient and career-orientated public service is of some relevance.

6.9 Finally, account should be taken of CPIV which requires that the Constitution should be supreme and binding on all organs of state. At least some of the actions and decisions of organs of state or persons exercising prosecutorial authority would be justiciable, which could go a long way to address concerns in regard to the consequences of the improper exercise of power by any prosecutorial authority. Furthermore, this CP is a reminder of the general implications of **constitutionalism**, which was addressed *inter alia* in the Namibian judgment dealt with below in the context of independence and accountability.

## 7. PRACTICALITY AND LOCAL AND REGIONAL NEEDS

7.1 We have already referred to the argument that the appointment of a NAG would result in ineffectiveness because decisions in regard to prosecutions would need to be taken nationally.

7.2 In practice, decisions would be taken at the appropriate level depending on the policy guidelines and approach adopted by the authority concerned. The Constitution might deal with this by ensuring that the prosecutorial authority is obliged to put an effective system in place. Administrative restructuring might be necessary but our future constitutional dispensation should not be limited by difficulties that current practices or arrangements might create.

7.3 It perhaps more practical and effective for one AG to account either to the Minister or to Parliament and to be questioned in regard to the function of that authority than for nine AGs to do so separately. (This aspect is dealt with under **'Political Responsibility and Accountability'** in 8.2 below.)

7.4 The NAG would be responsible for the investigation and prosecution of national crime.

7.5 The NAG would have the final authority to prosecute or not to prosecute. In practice, however, the NAG, like provincial AGs today, would rarely be called upon to make that decision personally. The right of every person to obtain a decision from a provincial AG is in practice satisfied by a decision of the provincial prosecutorial system taken at an appropriate level. So, for example, relatively junior prosecutors take decisions not to prosecute in cases of minor assault.

7.6 The NAG would have the ultimate responsibility to establish and maintain standards. Furthermore the national office would probably be responsible for a full investigation of and decision on cases concerning national economic unity and national security.

7.7 There is no indication that independent provincial AGs will be more suited to take legitimate local and regional needs and differences regarding e.g. cultural diversity and crime patterns into account than a national prosecutorial authority with regional deputies. Some cultural differences, e.g. related to concepts such as public morality, may be catered for by provincial legislation. Differences regarding crime patterns and geographical factors (such as proximity to national borders) could be taken into account in the formulation of a national policy regarding national crimes, or even in regional policies on matters not covered in national guidelines. Relevant differences could furthermore also exist on a local level. These should be taken care of by prosecutorial discretion within the context of a national policy and surely does not necessitate the independence of local prosecutors from provincial AGs. Again the federal prosecution system in the USA is instructive. Although all US Attorneys are under the authority of the US AG, they have considerable discretion over prosecuting decisions in their districts.

7.8 Of considerable interest in this regard is the submission of the Director of the Office of Serious Economic Offences which brings to light the contention that, that office too, should be upgraded to that of AG with the required independence and impartiality. A national prosecutorial officer is perhaps a more objective way of dealing with the difficulty concerning the status of the Director of this office.

## 8. POLITICAL RESPONSIBILITY, ACCOUNTABILITY, INDEPENDENCE AND ABUSE OF POWER

### 8.1 General

As indicated earlier, CPIV states that the Constitution shall be the supreme law of the land and thus - together with the other CPs - emphasizes the concept of constitutionalism and the nature of the constitutional state. In the recent Namibian judgment discussed earlier the implications of constitutionalism for questions regarding political responsibility, accountability, independence and abuse of power were analized. The conclusions of the court need not be repeated here. Useful guidelines could be derived from this judgment (although the situation in a constitutional state such as Germany does seem to differ from the answers of the court to the specific questions dealt with in the case).

## 8.2 Political responsibility and accountability

8.2.1 The Minister bears the political responsibility for issues related to prosecutorial policies. Therefore the Minister should have the duty to determine and issue policy guide-lines in respect of the prosecutorial authority in an open and transparent manner. However, the Minister cannot instruct the prosecution as to whether or not a particular prosecution should be instituted, because of the implications this would have for the independence of the prosecutorial authority. The Minister is accountable to Parliament.

8.2.2 It is clear that the AG must be fully accountable. One possibility for dealing with the needs of political responsibility and accountability, is to require the AG (or AGs) to submit regular reports to the Minister, who has to table such reports in Parliament. Both the Minister and the AG should then be required to appear before an appropriate Parliamentary Committee for questioning. Thus the Minister would be held accountable for policy issues and the AG for the practical implementation of policies, and the exercise of prosecutorial discretion.

8.2.3 Appropriate questioning, if sufficient evidence is available, could thus expose the AG should he or she not exercise his or her powers in accordance with the Constitution, or if he or she unreasonably disregards the policy guidelines, or fails to duly take the interests of the community into account. Parliament could thus play an indirect role in the formulation and observance of policy. The consequent publicity would also operate as a measure of control over these functions.

8.2.4 In order not to leave the Minister unprotected, unreasonable disregard of policy guidelines should perhaps result in an investigation by the Judicial Services Commission or similarly independent body, or a Parliamentary committee, where appropriate.

8.2.5 As stated earlier, the issuing of guidelines could to some extent capture the advantages of the legality principle, without doing away

with the opportunity principle.

## 8.3 Independence

8.3.1 There seemed to be some suggestion during a debate in the CC Sub-Committee that something more than independence of the prosecutorial authority from political control was required. However, this position was not further explained. We are not able to conceive of the independence of a prosecutorial authority other than by reference to that authority not being subject to political manipulation or control. As the Namibian case indicates, the provision in the Constitution for the independence of this function ought adequately to guard against the possibility of political interference.

8.3.2 Independence can also be established by determining an appropriate appointment mechanism. If appointment by the President is not regarded as sufficient for independence, the Judicial Service Commission or another similarly independent body or an appropriate Parliamentary committee could be the appointment agency.

8.3.3 Security of tenure in respect of certain members of the prosecutorial authority is also relevant to the question of independence. We suggest that dismissal should be effected only by the Judicial Service Commission (or other such body) if there is proof of incapacity, incompetence or misconduct in relation to the performance of the function.

## 8.4 Prevention of abuse of power

8.4.1 Some of the submissions make the point that the disadvantage of having a central prosecutorial authority is that too much power will be concentrated in one person.

8.4.2 Part of the resolution of this perceived difficulty lies in the fact that the conduct of the prosecutorial authority is subject to the Constitution and that some prosecutorial conduct could thus be challenged in court.

8.4.3 A further fear that the head of the national prosecutorial authority (though appointed by the Judicial Service Commission or some such mechanism) might surround him or herself with provincial prosecutorial heads who would be answerable to him/her and would do his/her bidding to the disadvantage of the country as a whole. This can be overcome by providing that all senior members of the prosecutorial authority, such as perhaps provincial heads, should be appointed by and subject to dismissal by the Judicial Service Commission.

8.4.5 This would mean that the provincial heads of the prosecutorial system would have a status and protection of their own despite the fact that they will be accountable to the national head in a manner appropriate to the relationship between the national head and the provincial head. Provincial heads of prosecution will also be protected from being isolated and singled out for criticism based on perceptions regarding their independence and even integrity, which could happen in a system with nine separately independent AGs.

## 9. RECOMMENDATION:

In summary it is recommended that:

9.1 there should be a single independent, impartial and accountable prosecutorial authority for the Republic;

9.2 this prosecutorial authority could be structured at national and provincial level, but need not be (details of structures could be left to legislation);

9.3 the national and provincial heads of this prosecutorial authority should be appointed by the JSC (or other such body) and should have appropriate security of tenure;

9.4 the Minister of Justice could issue policy guidelines and should also be accountable for such guidelines and related policy decisions.

## 10. NOMENCLATURE

A difficulty which need to be resolved before a draft can be attempted is that relating to the names to be given to particular positions.

The problems connected to the term "Attorney-General" have been referred to in paragraph 1.6.

In the draft below the terms "Director of Public Prosecutions" and "Deputy Director of Public Prosecutions" are used merely for the sake of convenience. Another term which may be considered is "Prosecutor-General", which is used in Namibia.

## 11. TENTATIVE DRAFTS

The following drafts are put forward merely for the purposes of discussion. The main differences relate to the question as to how much detail is to be included, or left to the legislature. The order of presentation does not represent any preference on the part of the Panel.

DRAFT A

"Prosecutorial Authority

1. The prosecutorial authority of the Republic shall be independent and impartial and shall function without fear, favour or prejudice.

2. The prosecutorial authority shall vest in the office of

   (a) a national Director of Public Prosecutions and

   (b) a Deputy Director of Public Prosecutions in respect of each of the provinces of the republic.

3. The National Director and each of the Deputy Directors of Public Prosecutions shall be appointed by the President acting on the advice of the Judicial Service Commission, with due regard to appropriateness of qualification, representativity, impartiality and independence, and the need for accountability.

4. The Director and Deputy Director of Public Prosecutions may be dismissed only on a recommendation by the Judicial Service Commission based on a finding of incapacity, incompetence or misconduct of any of the offices concerned.

5. No person or authority shall interfere with the performance of the functions of the prosecutorial authority.

6. All organs of state shall provide the prosecutorial authority with all the assistance and protection necessary for the effective performance of its functions.

7. The Minister may make policy guidelines for the performance of functions of the prosecutorial authority. Such guidelines shall be published in the Government Gazette."

DRAFT B

"Prosecutorial Authority

1. The authority to institute criminal prosecutions on behalf of the state shall vest in the Director of Public Prosecution of the Republic.

2. The prosecutorial authority/DPP shall be independent and impartial and shall function without fear, favour, or prejudice and no person or authority shall interfere with the performance of its/their functions.

3. The prosecutorial authority/DPP (and Deputy DPPs?) shall be

appointed by the President acting on the advice of the Judicial Service Commission with due regard to appropriate qualifications, independence and representativity.

4. After consultation with the DPP the Minister of Justice may issue guidelines for prosecutorial policy in an open and transparent manner.

5. The prosecutorial authority/DPP shall submit regular reports to the Minister and be accountable to Parliament.

7. The jurisdiction, powers and functions of the prosecutorial authority/DPP shall be regulated by national law."

DRAFT C

"Prosecutorial Authority

1. The authority to institute criminal prosecution on behalf of the state shall vest in the Director of Public Prosecutions of the Republic.

2. The prosecutorial authority/DPP shall be independent and impartial and shall function without fear, favour, or prejudice and no person or authority shall interfere with the performance of its/their functions.

3. The jurisdiction, powers and functions, accountability, appointment and tenure of the DPP/prosecutorial authority shall be regulated by national law."

## 12. LITERATURE CONSULTED

(In addition to submissions made to the CA)


* Bekker PM "National or Super Attorney-General: Political Subjectivity or Judicial Objectivity?" *Consultus April 1995 27*

* Bloch SL "The Early Role of the Attorney General in our Constitutional Scheme : In the Beginning there was Pragmatism" *Duke LJ 1989 561*

* Edwards JLJ "The Office of the Attorney-General - New Levels of Public Expectations and Accountability" Meeting of Commonwealth Law Ministers, Commonwealth Secretariat 1993

* Edwards JLJ *The Attorney-General, Politics and Public Interest 1984*

* Felkenes GT *The Criminal Justice System. Its Functions and Personnel 162 - 182*

* Fernandez L "The South African Prosecution Service: The Way Ahead" unpublished discussion paper 1995

* Fernandez L " Profile of a Vague Figure : the South African Public Prosecutor" *SALJ*

* Frank H"Staatsanwälte als politische Beamten" *DRIZ* Nov 1987 449

* Herrmann J "The Role of the Prosecutor or Procurator - Synthesis Report" *International Review of Penal Law.* Criminal Justice and Human Rights : Central and Eastern Europe and Former USSR 1992 533

* Martin L "Die Bundesanwaltschaft beim Bundesgerichtshof" in Glanzmann and Faller Ehrengabe für Bruno Heusinger 1968 85

* Rose & Paul

* Schaefer HC"Anspruch und Wirklichkeit - eine staatsanwaltliche Reflexion" *NJW* 1994 2876

* Tak PJP"The Legal Scope of Non-Prosecution in Europe" HEUNIE Finland 1986 26

* Yutar P "The Office of the Attorney-General in South Africa" *SACC* 1977 135

**DRAFT - 25 AUGUST 1995**

***Status***: Draft on instructions of the CC of the 25 August 1995 for debate in the CC.

## ATTORNEY GENERAL[1]

### Establishment

1. (1) There shall be a National Attorney General.[2] Every Province shall have a Provincial Attorney General.[3]

(2) The Attorneys General shall be independent and impartial.[4]

(3) The functions of the National Attorney General shall be -[5]

(a) to formulate policy guidelines in consultation with Provincial Attorneys General;

(b) to coordinate the work of and liaise with Provincial Attorneys General.

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1 There is no agreement on the recognition of this office in the Constitution. ANC and PAC are of the view that there is no need to provide for the office in the Constitution, they argue that it can be dealt with elsewhere. The whole formulation of this clause is based on the instructions given at the CC to Law Advisers to produce this draft to facilitate its debate on this.

2 The parties are not in agreement as to a need for a N.A.G. nor if such office is established, that its incumbent should be called National Attorney General. DP and ACDP are of the view that there is need for this office. FF has an opposite view. The ANC whilst not seeing a need to constitutionalise this office, agrees that there should be a N.A.G.

3 The NP and DP argue for establishment of these office in all provinces.

4 All parties are agreed on the independence of the A-G.

5 There are diverse views on what the functions of the N.A.G. should be.

(4) The authority to institute criminal proceedings on behalf of the state vests in the Provincial Attorneys-General.[6]

**Appointment**[7]

**2.** (1) The National Attorney General shall be appointed by the President on the recommendation of[8] ....

(2) A Provincial Attorney General shall be appointed by the Premier of his or her province ....[9]

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6 There is no agreement on this.

7 There is an agreement that the AG has to be independent and such independence has to be protected by the mechanism for the appointment of the incumbent.

8 The NP proposes that the AG be appointed by the President on recommendation of the Judicial Service Commission (JSC), and for that reason the composition of this body has to be reconstituted to include two Attorneys General. The matter requires further debate.

9 The FF proposes that the PAG be appointed by the Premier of the Province in consultation with the Judicial Service Commission. The matter requires further debate.